No. 90-1049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN H. BAKER, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and JAMES B. BUSEY, Administrator,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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This case presents an issue important to our national transportation policy: whether the FAA has all but unreviewable authority to refuse to grant a single exception to a rule which grounds all veteran commercial airline pilots on their sixtieth birthdays, regardless of individual health or qualifications. The majority opinion below effectively rendered agency denials of such exemptions forever unreviewable in the courts.

Respondent's opposition to the petition fails to confront the issue of whether the FAA can continue to refuse to grant any exemptions to its "age sixty rule," in light of the agency's duty to maintain "flexibility and adaptability" in the administration of its regulatory responsibilities,

particularly in the face of revolutionary advances in medical knowledge. *American Trucking Associations, Inc. v. Atchison, Topeka, and Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967). It defies comprehension that, after thirty years, the FAA professes to have learned nothing about disease detection or individual assessment techniques to enable selected airline pilots to continue their employment after age sixty on a case-by-case basis.

The FAA describes petitioners' requests for exemptions under 49 U.S.C. App. § 1421(c) and 14 C.F.R. § 11.25 as attempts to "circumvent" the age sixty rule (Opp. 7) and as "frontal attacks on [its] reasonableness." (*Id.*) This argument was made and rejected in *Aman v. FAA*, 856 F.2d 946, 949 n.2 (7th Cir. 1988). There, as here, the agency "presented no authority or logical argument for the proposition that an exemption must be denied if approval would cast doubt on the basis for a rule." *Id.*

The FAA's opposition is curiously silent about the state of isolation among government agencies in which the FAA finds itself on the issues presented here. The National Institute on Aging, National Institutes of Health, and the U.S. Equal Employment Opportunity Commission have spoken out publicly for many years in opposition to the FAA's age sixty rule and in strong support of the ability of modern medical science and aviation technology to evaluate the health and fitness of airline pilots as individuals rather than as members of a stereotyped group, consistent with the purposes of the Age Discrimination in Employment Act, 29 U.S.C. § 621.[1] *See Western Air Lines, Inc.*

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[1] Testimony and submissions of T. Franklin Williams, M.D., Director, National Institute on Aging, National Institutes of Health. Age Discrimination and the FAA Age Sixty Rule, Hearing before the Select Committee on Aging, H.R. Comm. Pub. No. 99-533, 99th Cong., 1st Sess. 9, 134 (1985). *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 123 n.17 (1985) (EEOC does not endorse age sixty rule).

v. Criswell, 472 U.S. 400, 407 (1985) (record "reveals that both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis"). Illustrative of the FAA's adherence to outmoded principles is its fixation on the medical state of the art in the 1970s (Opp. 6-10) and particularly the decision in *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1978). When *Starr* was decided, however, the FAA had not yet returned airline pilots to unrestricted service following heart attacks and bypass surgery.[2] Moreover, the *Starr* court warned the FAA to adhere to the "congressionally expressed concern that [the agency] keep abreast" of the medical state of the art, since "[d]eliberate disregard of new advances in medical testing standards that made it more readily feasible to measure the hazard person by person . . . might require a different result. . . ." *Id.* at 312.

I. FAA's Refusal To Consider Any Exemptions To The Age Sixty Rule Is Contrary To Statutory Intent And Agency Regulations.

FAA argues that, because the Federal Aviation Act provides that it " 'may grant' exemptions . . . in the public interest" (49 U.S.C. App. § 1421(c)), there is no "statutory entitlement" and "no statutory mandate to issue one." (Opp. 9) In urging that it be allowed to continue denying all exemptions for the next thirty years, as it has for the last thirty—"until it determines" to issue them (*id.*)—FAA fails to acknowledge: (1) its obligation to provide an effective waiver mechanism for special circumstances as a matter of constitutional and statutory duty;[3] and (2) its

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[2] *See also Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979); *Keating v. FAA*, 610 F.2d 611 (9th Cir. 1979); and *Rombough v. FAA*, 594 F.2d 59 (2d Cir. 1979).

[3] *Southwest Pennsylvania Cable TV, Inc. v. FCC*, 514 F.2d 1343, 1347 (D.C. Cir. 1975); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

own regulations, which provide for the grant of exemptions when to do so "would not adversely affect safety" or would provide a "level of safety equal to that provided by the rule from which the exemption is sought." 14 C.F.R. § 11.25. The FAA's abandonment of its own regulations in this case compelled dissenting Judge Will to describe those regulations as a "fraud." (Pet. App. 18a)

II. The Decision Of The Court Below Is In Conflict With The Law In Other Circuits Because It Permitted The FAA To Apply Different Decisional Criteria To Similar Exemption Requests.

Not only is the decision below in conflict with those in *Airmark Corp. v. FAA*, 758 F.2d 685, 691-95 (D.C. Cir. 1985), and in four other circuits (*See* Pet. 14-15), but it is also at odds with the Seventh Circuit's decision in *Aman v. FAA*. In *Aman*, 856 F.2d at 957, the court noted that the deference to which the FAA was entitled was not "a license to issue inconsistent determinations." Recognizing the FAA's increased willingness to issue "special" exemptions to pilots under age sixty with all of the same diseases and disabilities which are claimed to disqualify age sixty pilots by their mere potential, the *Aman* court ordered the FAA to explain the "statutory justifications for these distinctions." The court emphasized that, consistent with the teachings of *Airmark*, it was "essential that the construction of [the FAA's] statutory responsibilities . . . make sense of these special issuances. . . ." *Id.*[4]

In response to the mandate in *Aman*, the FAA explained that its no-exemption policy has been enforced for thirty

[4] The court described "special issuances" (exemptions) under 14 C.F.R. § 67.19 as the "functional equivalent of a second exemption mechanism." *Aman*, 758 F.2d at 957.

years because of the risk of "sudden incapacitation." (*See* Opp. 2-4, 8, 10-12) Conceding that it has granted "some"—in reality over 1,300—exemptions to airline pilots following treatment for myocardial infarction, coronary bypass surgery, stroke, loss of consciousness, chronic alcoholism and drug addiction, psychiatric disorder, and other permanent and progressive conditions, the FAA asserted that its "more flexible exemption policy for pilots under the age of sixty" was in the public interest because persons with "known medical disease or deficiency" could be "identified and monitored," while apparently healthy and carefully examined sixty-year-olds could not. (Opp. 3, 12) FAA stated it knew more about heart disease and drug addiction than it did about aging, so it had greater confidence about the likelihood of incapacitation and the future health status of diseased pilots than it did for pilots reaching sixty. The agency adhered to this position despite evidence in the record of alcoholic relapses, subsequent heart attacks and strokes, and other later disqualifying events among the younger pilots. Moreover, the FAA never described the specific medical/psychologic protocols which allowed it to exempt pilots afflicted by progressive diseases with known risks of recurrence. Nor did it explain, in view of its claim that the *potential* of these same diseases justified denial of age sixty exemptions, why such disease-detection protocols used for pilots under sixty could not also evaluate and make reasonable predictions for healthy sixty-year-olds with equal or greater confidence.

Despite flaws in the FAA's articulated distinction between the exemption standard applied to diseased pilots under sixty and healthy pilots over sixty, the majority below abdicated its review function and abandoned the *Aman* mandate by relieving the agency of its duty to apply consistent exemption criteria or provide a cogent explanation for a different standard. The FAA's proffered

explanation for its different exemption standards based on age was not a cogent, logical explanation meeting the rule of law announced in *Airmark* and *Aman*. Contrary to the FAA's representation that the majority below "upheld the FAA's distinction" between the age sixty and "special" exemption standards, in fact it concluded that "[e]xactly how this distinction applies as a practical matter is not entirely clear to us. . . ." (Pet. App. 7a)[5]

In this Court, FAA argues that the *Airmark* requirement that federal agencies apply the same exemption policy to different petitioners was satisfied here by its consistent refusal to grant age sixty exemptions. In *Aman*, however, the court made clear that the *Airmark* prohibition on "inconsistent determinations" required FAA either to apply the same standard to age sixty exemptions as it applies to "special" medical exemptions, or to justify its refusal to do so consistent with the statute and agency regulations. 856 F.2d at 957.

While urging this Court to approve the standard of essential unreviewability created by the majority below, the FAA states that the rule is not "indelible" (Opp. 7), and that the agency has "continued to research and examine whether new advances in medical science can identify individual pilots over the age of sixty who do not pose a risk. . . ." (*Id.*) While no such research has ever before been clearly identified, the agency now discloses that it

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[5] Respondent cites *Starr v. FAA*, 589 F.2d at 313 to support its position that merely because it has a "liberal exemption policy" for diseased and disabled pilots under age sixty does not require it to liberalize its consideration of age sixty rule exemption petitions. (Opp. 12) The *Starr* analysis was clearly superseded in *Aman*, however, when the court required FAA to explain the "statutory justifications for [its] distinction[ ]" between the increased willingness to grant "special" exemptions "to pilots otherwise disqualified by episodes of heart disease or alcoholism" and the denial of all age exemptions. 856 F.2d at 957.

has "reviewed" two studies. (Opp. 7, n.3) However, the principal investigators of the first—the Navy's "1000 Aviator Study"—have strongly supported the grant of age sixty exemptions.[6] The authors of the second, a panel assembled by the Institute of Medicine for the National Institutes of Health in 1981, have stated that "age alone is not the best predictor of risk" and that "risk-factor profiles and a more thorough testing of high risk individuals are adequate to identify those pilots whose health status would represent a threat to safety because of possible acute incapacitation."[7]

In denying the exemptions at issue here, the FAA relied "heavily" (Pet. App. 4a) on a 1983 report which purported to show that general aviation pilots over age sixty had relatively high accident rates, while pilots in their fifties had the lowest accident rate of all age groups. (*See* Pet. App. 53a-58a, 66a-67a) Representing to this Court that "older pilots were more prone to accidents" (Opp. 10), the FAA fails to mention that the report on which it relies was determined to have "serious flaws," and that it "significantly understated" the accident rate "for all pilots under age sixty" (the "jump in accidents . . . simply looks too large to be credible"). (Pet. App. 5a)

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[6] J.A. 447-53, R. 315 (June 25, 1986 letter to FAA docket from E. York, M.D., and July 7, 1986 letter to FAA from N.R. MacIntyre, M.D.).

[7] R. 316 at F-153, F-160. That same report, which FAA claims to have reviewed so as not to "shirk[ ] its duty" (Opp. 7), found that "[n]o accidents were attributed to incapacitation" during the period studied (F-56), and that cardiovascular disease represented only 18 percent (12 of 67 reported incidents) of the incapacitations reported in the relevant period. (F-57) Data presented in the report indicate that airline pilots in their 50s have the lowest accident/incident rate of all age groups (F-50), despite the fact that they "tend to fly the largest and fastest airplanes." (Opp. 6)

The FAA apparently believes that it softens the impact of its no-exemption policy by noting that the age sixty rule does not apply to commuter, corporate, and private pilots, or to airline flight engineers or navigators (a position which no longer exists). (Opp. 6, n.2) This, however, only highlights the hopelessly inconsistent standards the agency has applied. Clearly, if the physical incapacitation/deterioration rationale for an age sixty cut-off had medical validity, the agency would have long since applied the same rule to all aviation operations in which air safety is at stake. It is worth noting that the FAA applies no upper age limitation to its own pilots, who command large airline-type aircraft. *EEOC v. Boeing Co.*, 843 F.2d 1213, 1216 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988). Indeed, with the recent lifting of all age limits for astronauts by the National Aeronautics and Space Administration, a pilot over age sixty can fly national security payloads to the moon, but cannot fly a DC-9 to Cleveland.

III. If FAA Is Allowed To Continue Denying Exemptions Until Such Time As It Is "Convinced" To Grant One, A Standard Of Unlimited Agency Discretion And Unreviewability Will Have Been Established.

The FAA asks this Court to grant it unreviewable discretion to deny exemptions so long as it is "not convinced." (Opp. 10) It requests that the Court not "second guess the agency's evaluation of the medical evidence," but instead defer to its "policy decision" to deny all exemptions. (Opp. 9-10) This Court has stated that it will defer to agency expertise when it is demonstrated but cautioned that, without strict and demanding guidelines, such "expertise . . . can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962).

The agency declares that "there will be no exemption unless and until the FAA determines that medical science can assess the individual pilots' risks of sudden incapacitation. . . ." (Opp. 11) Yet, while the FAA is "blindly adhering to an outdated rule" (*Starr*, 589 F.2d at 314), there is a broad consensus in the medical community, reflected in the record below, that the risk of heart attack and other disorders can be assessed with a high degree of confidence on an individual basis. (*See e.g.*, J.A. 457, submission of President-Elect of the American Heart Association).

The FAA cites *Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979) for the proposition that, "[a]t some point, the state of the medical art may become so compellingly supportive . . . that it would be an abuse of discretion not to grant an exemption." (Opp. 8) That time has come. The record below, consisting of over 400 separate submissions from scientists, physicians, and aviation experts, contain virtually unanimous support for the grant of exemptions to FAA's onerous rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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